TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 638

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

GULF REFINING COMPANY, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

VOLUME I.

PROCEEDINGS AND APPEAL PAPERS.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1922

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UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

FEDERAL TRADE COMMISSION,
v.
GULF REFINING COMPANY. } Docket No. 320.

CERTIFICATE.

I, J. P. Yoder, Secretary of the Federal Trade Commission, certify that the following is a full, true and correct transcript of the record in the above entitled proceeding, including the pleadings, testimony, exhibit, the Commission's report, findings as to the facts and conclusions and orders therein; that this transcript is transmitted to the United States Circuit Court of Appeals for the Third Circuit pursuant to service upon the Commission of a copy of a petition for review on the 30th day of September, A. D. 1920.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Federal Trade Commission to be affixed hereto, at the City of Washington, in the District of Columbia, this 8th day of October, A. D. 1920.

[SEAL.]

J. P. YODER,
Secretary.

UNITED STATES OF AMERICA.

BEFORE

FEDERAL TRADE COMMISSION.

DOCKET NO. 320.

FEDERAL TRADE COMMISSION

VS.

GULF REFINING COMPANY, RESPONDENT.

Transcript of the proceedings before the Federal Trade Commission—certified to the United States Circuit Court of Appeals for the Third Circuit, in accordance with the provisions of Section 5 of the Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and of

Section 11 of the Act of Congress approved October 15, 191 entitled "An Act to supplement existing laws against unlawf restraints and monopolies, and for other purposes"—as a resu of the petition filed in said Court on September 11, 1920, by th Attorneys for the Gulf Refining Company, for a review of th Order to Cease and Desist entered by the Federal Trade Co mission against said Gulf Refining Company under date April 27, 1920.

Resolution authorizing complaint—Dated July 18, 1919.

At a regular session of the Federal Trade Commission, held at i office in the City of Washington, D. C., on the 18th day of Jul A. D. 1919.

Present: John Franklin Fort, Chairman, Victor Murdock, Hust Thompson, William B. Colver, Commissioners.

FEDERAL TRADE COMMISSION *v.* GULF REFINING COMPANY.	Docket No. 320. Complaint in the matter of the alleg violation of Section 5 of an Act Congress approved September 2 1914, and of the alleged violation Section 3 of the Act of Congress a proved October 15, 1914.

WHEREAS, the Federal Trade Commission has reason to believe tha the Gulf Refining Company has violated and is violating the pro sions of Section 5 of the Federal Trade Commission Act, and of Se tion 3 of an Act of Congress approved October 15, 1919; therefo be it

RESOLVED: That the Federal Trade Commission issue and ser upon the said Gulf Refining Company, its complaint, stating i charges in that respect in substantially the form hereunto annexed and be it

FURTHER RESOLVED: That notice be given to the said Gulf Refinin Company, as required by law, that the charges of said complain will be heard by the Commission at its office in the City of Washing ton, D. C., on the 15th day of September, 1919, at 10.30 o'clock i the forenoon of the said day, or as soon thereafter as the same ma be reached.

Adopted by the Commission.

(Signed) J. P. YODER,
Secretary.

[SEAL.]

Complaint—Dated July 18, 1919.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss.:

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 18th day of July, A. D. 1919.

Present: John Franklin Fort, Chairman; Victor Murdock, Huston Thompson, William B. Colver, Commissioners.

FEDERAL TRADE COMMISSION *v.* GULF REFINING COMPANY.	Docket No. 320. Complaint in the matter of the alleged violation of Section 5 of the Act of Congress approved September 26, 1914, and Section 3 of the Act of Congress, approved October 15, 1914.

I.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it, that the Gulf Refining Company, hereinafter referred to as the respondent, has been using unfair methods of competition in interstate commerce, in violation of the provisions of Section 5 of the Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect on information and belief as follows:

PARAGRAPH ONE: That the respondent, Gulf Refining Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at the City of Pittsburgh, State of Pennsylvania; that for more than four years last past respondent has been engaged in the business of purchasing and selling refined oil and gasoline, and the leasing and loaning of oil pumps, storage tanks or containers and their equipments, in various states of the United States and the District of Columbia in competition with numerous persons, firms, corporations and copartnerships similarly engaged.

PARAGRAPH TWO: That the respondent, in the conduct of its business, as aforesaid, and as hereinafter more particularly described, purchases refined oil and gasoline, hereinafter referred to as "products," and also purchases oil pumps, storage tanks or containers, hereinafter referred to as "devices," the said devices being used to contain said products, the said products and devices then being handled and stored in the various states of the United States and transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices are leased or loaned by respondent to various persons, firms, corporations and copartnerships; that in the con-

duct of its business of purchasing and selling such products and sell-
ing, leasing or loaning such devices, the same are constantly moved
from one state to another by respondent and there is conducted by
respondent a constant current of trade in such products and devices
between various states of the United States; that there are numer-
ous competitors of respondent who, in the conduct of their busines
in competition with respondent, purchase similar products and pur-
chase and manufacture similar devices, the said devices being used
to contain said products, the said products and devices then being
handled and stored in the various states of the United States and
transported in interstate commerce; that the aforesaid products are
sold and the aforesaid devices sold, leased or loaned by such com-
petitors of respondent to various persons, firms, corporations and co-
partnerships; that in the conduct of their business, as aforesaid, com-
petitors of respondent constantly move such products and devices
from one state to another and there is conducted by said competitors
a constant current of trade in such products and devices between the
various states of the United States; that respondent and many of its
competitors have conducted their said businesses in a similar manner
to that above described throughout the past four years.

PARAGRAPH THREE: That respondent in the conduct of its business
as aforesaid, with the effect of stifling and suppressing competition
in the sale of the aforesaid products and in the sale, leasing or
loaning of the aforesaid devices and other equipments for storing
and handling the same, and with the effect of injuring competitors
who sell such products and devices, has within the four years last
past sold, leased or loaned and now sells, leases or loans the said
devices and their equipments for prices or considerations which do
not represent reasonable returns on the investments in such devices
and their equipments; that many such sales, leases or loans of the
aforesaid devices are made at prices below the cost of producing and
vending the same; that many of such contracts for the lease or loan
of such devices and their equipments provide or are entered into
with the understanding that the lessee or borrower shall not place
in such devices, or use in connection with such devices and their
equipments, any refined oil or gasoline of a competitor; that only
a small proportion of the dealers in gasoline and refined oil under
such agreements and understandings deal also in similar products of
respondent's competitors and that only a small proportion of such
dealers require or use more than a single pump outfit in the conduct
of their said business; that there are numerous competitors in the
sale of such products, who are unable to enter into such lease agree-
ments or understandings because of the large amount of investment
required to carry out such lease agreements as a competitive method
of selling refined oil and gasoline; that there are numerous other
competitors of respondent engaged in the manufacture and sale
of said devices and their equipments, who do not deal in refined
oil and gasoline, and therefore do not sell or lease said devices and
their equipments for a nominal consideration on a condition

understanding that their products only are to be used therein; that the said numerous competitors who were unable to enter into such lease agreements or understandings, as aforesaid, have lost numerous customers in the sale of refined oil and gasoline to respondent because of the business practices of respondent hereinbefore set forth. That the said numerous other competitors of respondent who manufacture and sell said devices and their equipments, but do not sell refined oil and gasoline, as aforesaid, have lost numerous customers and prospective customers for the purchase of their devices and equipments because of the said business practices of respondent, as hereinbefore set forth.

II.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it, that the Gulf Refining Company, hereinafter referred to as the respondent, has been using unfair methods of competition in interstate commerce, in violation of the provisions of Section 3 of the Act of Congress, approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect on information and belief as follows:

PARAGRAPH ONE: That the respondent, Gulf Refining Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business in the city of Pittsburgh, State of Pennsylvania; that for more than four years last past respondent has been engaged in the business of purchasing and selling refined oil and gasoline and the leasing of oil pumps and storage tanks and their equipments in various states of the United States and the District of Columbia, in competition with numerous persons, firms, corporations and copartnerships similarly engaged.

PARAGRAPH TWO: That the respondent in the conduct of its business, as aforesaid, and as hereinafter more particularly described, purchases refined oil and gasoline, hereinafter referred to as "products," and also purchases oil pumps, storage tanks or containers, hereinafter referred to as "devices," the said devices being used to contain said products, the said products and devices then being handled and stored in the various states of the United States and transported in interstate commerce. That such products are sold, and such devices sold, leased or loaned by respondent to various persons, firms, corporations and copartnerships; that in the conduct of its business of purchasing and selling such products and selling, leasing or loaning such devices, the same are constantly moved from one state to another by respondent, and there is conducted by respondent a constant current of trade in such products and devices between the various states of the United States; that there are numerous competitors of respondent who in the conduct of their

businesses in competition with respondent purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that such products are sold and the aforesaid devices sold, leased or loaned by such competitors in competition with respondent to various persons, firms, corporations and copartnerships; that in the conduct of such business, as aforesaid, respondent's competitors constantly move such products and devices from one state to another and there is conducted by said competitors of respondent a constant current of trade in such products and devices between the various states of the United States; that respondent and many of its competitors have conducted their said businesses in a similar manner to that above described throughout the four years last past.

PARAGRAPH THREE: That the respondent, for four years last past, in the conduct of its business as aforesaid, has leased and made contracts for the lease and is now leasing and making contracts for the lease of said devices and their equipments to be used within the United States, and has fixed and is now fixing the price charged therefor on the condition, agreement or understanding that the lessees thereof shall not purchase or deal in the products of a competitor or competitors of respondent; and that the effect of such leases or contracts for lease, and conditions, agreements, or understandings, may be and is to substantially lessen competition and tend to create a monopoly in the territories and localities where such contracts are operative.

Therefore, notice is hereby given you, the said Gulf Refining Company, that the charges of this complaint will be heard by the Federal Trade Commission at its offices in the City of Washington, D. C., on the 15th day of September, A. D. 1919, at 10.30 o'clock in the forenoon of that day, or as soon thereafter as the same may be reached, at which time and place you shall have the right to appear and show cause why an order should not be entered by the Federal Trade Commission requiring you to cease and desist from the violations of law charged in this complaint.

And you will further take notice that within thirty (30) days after the service of this complaint, you are required to file with the Commission an answer in conformity with Rule III of the Rules of Practice before the Commission.

In witness whereof, the Federal Trade Commission has caused this complaint to be issued, signed by its Secretary, and its official seal to be affixed hereto at the City of Washington, D. C., this 19th day of July, A. D. 1919.

By the Commission.

[SEAL.] (Signed) J. P. YODER.
Secretary.

(Signed) CLAUDE R. PORTER,
Chief Counsel for the Commission.

Respondent's answer—Filed September 4, 1919.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

FEDERAL TRADE COMMISSION *v.* GULF REFINING COMPANY.	Docket No. 320. Complaint in the matter of the alleged violation of Section 5 of the Act of Congress approved September 26, 1914, and Section 3 of the Act of Congress approved October 15, 1914.

The respondent, the Gulf Refining Company, answers the complaint in the above-entitled matter as follows:

I.

As to the first division of said complaint, paragraph one, the respondent admits that it is a corporation organized, existing and doing business under the laws of the State of Texas, with its principal office in the City of Pittsburgh, State of Pennsylvania, and that during the period mentioned in said complaint said Company has been engaged in the business, not only of purchasing and selling refined oil and gasoline but of manufacturing all forms of petroleum products at its refineries at Port Arthur and Forth Worth, Texas, and that incident to the sale of gasoline at retail, said respondent has, for several years past, leased to customers oil pumps and storage tanks in various states of the United States, and that said respondent has been engaged in active and continuous competition with numerous firms, corporations and copartnerships similarly engaged.

II.

As to paragraph two of the said complaint respondent admits that it has purchased, from time to time, from various manufacturers, pumps and tanks, as therein stated, and that said devices have been leased by it to various customers throughout the United States, but respondent denies that it is engaged in the business of purchasing and selling such devices in interstate traffic, or that there is conducted by respondent a constant current of trade in such devices in various states of the United States, or that in the purchase and leasing of such equipment and devices, respondent is competing with various persons, firms, corporations and copartnerships engaged in the manufacture and sale of such devices; on the contrary the respondent avers that it is engaged in the sale of petroleum and petroleum products manufactured and purchased by it throughout the United States in open, fair and unrestricted competition with other persons, firms, corporations and copartnerships engaged in similar business; and that the purchase and leasing of pumps and tanks, referred to in the complaint as "devices," is merely incidental to its business as a mar-

keter of petroleum and petroleum products, especially gasoline, and that the leasing of said devices by this respondent is a proper and lawful practice; that same is not an unfair method of competition and has no tendency to create or maintain a monopoly.

III.

As to paragraph third of the first division this respondent denies that in the conduct of its business, as aforesaid, it has any intention to stifle and suppress competition, to injure competitors, or to create a monopoly in the sale of its gasoline; it is particularly denied that the method of operating its business, employed by this respondent, has the effect of either stifling or suppressing competition, or injuriously affecting competitors engaged in the business of marketing and selling petroleum products. It is true that for four years last past this respondent has leased at nominal rentals, to customers desiring to market its products, tanks and pumps, designated in the complaint as "devices," and that the amount of such rentals is not based upon a reasonable return to the respondent upon the investment in such devices and equipment.

IV.

It is also true that these leases are conditioned upon the exclusive use of the devices and equipment leased for the handling of gasoline manufactured and sold by respondent, but said contracts do not contain any restriction, or is there any understanding between the respondent, and the customers to whom such devices are leased, that they shall not purchase gasoline and other petroleum products from competitors; the restriction is limited only to the use of the particular device furnished by the respondent, and is restricted to the storage and sale of gasoline manufactured and furnished by the respondent under its established and protected trade names.

V.

It is also denied that there is anything in the contract of lease, or in any verbal understanding incident thereto, that prevents or prohibits the customer from installing equipment or devices of competing oil companies, and from handling and selling products of such competitors in or from devices either owned by the customer or furnished by competing oil companies. In many cases customers to whom devices and equipment have been leased at nominal rentals by respondent, have installed, under practically similar arrangements, equipments and devices of competitors of respondent, and the respondent company has frequently installed its devices and equipment, for the exclusive use and sale of its products and protected brands of gasoline, with customers who have already installed and have in use, similar equipment for the exclusive sale and handling of gasoline manufactured and sold by other oil companies in

ompetition with the products of respondent. A printed copy of the orm of agreement and contract, under which said devices are leased retailers by respondent company, is hereto attached, marked Exhibit A," and is made a part of this answer.

VI.

As to division two, paragraph one, the facts as stated are not enied, except that in addition to the purchasing and selling of efined oil and gasoline, the respondent avers that it is engaged in he business of manufacturing gasoline and all forms of petroleum roducts, and that the business of purchasing and leasing oil pumps nd storage tanks is merely incidental to the selling of gasoline at etail.

VII.

As to paragraph two, division two, of said complaint it is denied hat the respondent is engaged in the purchase and lease of said umps and tanks, designated as "devices" in said complaint, and the same are constantly moved from one state to another by respondent, and that there is conducted by respondent a constant current of trade in such devices between various states of the United States. It is true that in the manufacture and sale of petroleum and petroleum products, respondent is engaged in interstate commerce, and is constantly transferring said products from state to state, and maintains a constant current of trade in such products between the various states of the United States and in competition with others.

VIII.

As to paragraph three, division two, of complaint, it is denied that the respondent, in the leasing of said tanks and pumps, referred to in the complaint as "devices" has fixed, or is fixing the price charged therefor on a condition, agreement or understanding that the lessee thereof shall not purchase or deal in the products of competitors of the respondent. There is no such agreement or understanding, but there is a provision in the contract that the particular equipment, or device, so leased at a nominal rental by respondent, shall not be used for the storage or sale of other petroleum products than those manufactured and sold by respondent. It is denied that the effect of such leases or contracts for lease, and conditions and agreements, is to substantially lessen competition, or that the same has any tendency to create a monopoly in the territories or localities where such contracts are operative.

IX.

And generally the respondent makes answer that the agreement of lease, used by the respondent and in use at the present time (copy of which is hereto attached, marked "Exhibit A"), is a legal, proper

agreement and is necessary to protect the respondent and the general public in the purchase of the special grades of gasoline manufactured by respondent, and sold under protected and well-established trade names; said agreement or lease is not used by the respondent for any illegal, improper or unfair purpose whatsoever, and the respondent, further avers that the effect of said agreement is not and cannot be to lessen competition by any unfair method or to restrict or stifle competition within the territory where said contracts are in force, or that said practice has a tendency to, or in fact does create a monopoly in the sale of gasoline and similar products manufactured and sold by the respondent.

The respondent denies generally each and all the allegations of the complaint not hereinbefore expressly admitted.

GULF REFINING COMPANY.
By GEO. S. DAVISON.

EXHIBIT A.

Memorandum of Agreement.

Agreement, made this ____ day of _____, 19____, between the Gulf Refining Company, party of the first part, and _____ of the City of _____ State of _____, party of the second part:

WHEREAS, The part of the second part is now purchasing gasoline from the party of the first part for sale to the consumers thereof, and has requested the party of the first part to install an equipment on his premises situate _____ for the better storage and handling of the gasoline so purchased; and

WHEREAS, The party of the first part is willing to comply with said request, and is about to install upon the premises of the second party a gasoline storage tank with necessary piping, fittings and pump.

Now this agreement witnesseth:

FIRST. That the party of the second part is the owner of the premises above mentioned, or if not the owner that he has a valid and subsisting lease for the same. If the party of the second part is a tenant and not the owner of the premises, said party agrees to procure the written consent of the owner to the installation of the equipment hereinafter mentioned, with an agreement that the property of the party of the first part stored or installed upon the premises shall be exempt from levy, sale or distress for rent and that upon the determination of this contract the said party of the first part shall have the right to enter upon said premises for the purpose of removing any and all of its properties therefrom.

SECOND. That said equipment shall be used solely for the storage and handling of gasoline supplied by the party of the first part under the terms of this agreement.

THIRD. That the said party of the second part will at his own cost and expense maintain such equipment in good condition and repair as long as he shall continue to use the same.

FOURTH. That the said party of the second part will not encumber or remove said equipment or do or suffer to be done anything whereby said equipment or any part thereof shall be seized, taken in execution, attached, destroyed or damaged, or by which the title of the party of the first part to the same, may in any way be disturbed or prejudiced.

FIFTH. That the party of the second part shall indemnify and save harmless the party of the first part of and from any and all liability for loss, damage, injury or other casualty, to persons or property, caused or occasioned by any leakage, fire or explosion of gasoline stored in said tank, or drawn through said pump, whether due to imperfection in said equipment or any part thereof, latent or patent, or to any fault in the installation thereof, and whether the same arises from negligence or otherwise.

SIXTH. That in case the party of the second part shall at any time use the said equipment for any other purpose than the storage and handling of gasoline purchased from the party of the first part, or should said second party cease for thirty (30) days to purchase gasoline from the party of the first part and sell the same in his regular trade, the right to the use of said equipment shall terminate and the party of the first part shall thereupon have the right to enter upon the said premises and remove said equipment and every part thereof.

SEVENTH. This agreement shall terminate forthwith upon the sale or other disposition of the premises by the party of the second part and in any event at the end of one year from the date thereof. Upon the expiration of this agreement the party of the first part shall have the right to enter upon said premises and remove said equipment and every part thereof.

EIGHTH. For the use of said equipment the party of the second part agrees to pay to the party of the first part an annual rental of one dollar, payable annually in advance.

Executed in triplicate the day and year as above written.

GULF REFINING COMPANY.

By _____

_____

Witness:

_____

Witness:

_____

In consideration of One Dollar to me in hand paid, and other good and sufficient consideration, I_____ _____, owner of the premises mentioned in the within agreement, having read and being familiar with the same, do hereby consent to the installation by the Gulf Refining Company of the storage

equipment above mentioned, together with pumps, fittings, etc., and do further agree that the property of said Gulf Refining Company, including storage tanks, pumps and fittings, shall be exempt from levy, sale or distress for rent due or to become due for the premises above mentioned during the continuance of the present lease or any renewal thereof; also that said Gulf Refining Company may remove said property, at any time, as provided for in said agreement.

Witness my hand and seal this_____day of_____, 19__

_____[SEAL.]

Witness:

_____

Commission's report, findings of facts and conclusions—Dated April 27, 1920.

UNITED STATES OF AMERICA,

Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 27th day of April, A. D. 1920.

Present: Victor Murdock, Chairman, Huston Thompson, William B. Colver, Nelson B. Gaskill, Jno. Garland Pollard, Commissioners.

FEDERAL TRADE COMMISSION
v.
GULF REFINING COMPANY. } Docket No. 320.

The Federal Trade Commission having issued and served its complaint herein wherein it is alleged that it had reason to believe that the above-named respondent, Gulf Refining Company, has been and now is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and has been and now is violating the provisions of Section 3 of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and that a proceeding by it in respect of such alleged violation of Section 5 of the Act of September 26, 1914, would be to the interest of the public, and fully stating its charges in that respect, and the respondent having entered its appearance by W. J. Guthrie, Esq., its attorney, and having duly filed its answer, admitting certain of the allegations of said complaint and denying certain others thereof, and containing certain allegations as affirmative defense, and the Commission having offered testimony in support of the charges of said complaint, and the respondent having rested its case without introducing evidence, and the cause having been duly argued before the Commission, and

the Commission having duly considered the record and being fully advised in the premises, now makes its Report and Findings as to the Facts, and Conclusions:

Findings of Facts.

PARAGRAPH ONE: That the respondent is a corporation organized, existing and doing business under and by virtue of the laws of the state of Texas, with its principal office located in the City of Pittsburgh, in the State Pennsylvania, and is now and has been engaged in the business of purchasing and selling refined oil and gasoline, and is largely engaged in refining crude petroleum, and that it is now and has been during the four years last past, in connection with its aforesaid business, engaged in the leasing and loaning, but not in the manufacture, of oil pumps, storage tanks and containers, and equipment hereinafter referred to as devices, in various states of the United States, in competition with numerous other persons, firms, copartnerships and corporations also engaged in the business of selling refined oil and gasoline, and refining crude petroleum.

PARAGRAPH TWO: That the respondent, in the conduct of its business as aforesaid, and as hereinafter more particularly described, extensively refines petroleum and its products and purchases refined oil and gasoline and also purchases oil pumps, storage tanks and containers hereinafter referred to as devices. That respondent has been and now is maintaining numerous storage stations in various states to which it ships from its refineries, refined oil and gasoline in bulk. And that the said refined oil and gasoline is thereafter sold and delivered to retail dealers in the said several states. That the respondent, in the course of its said business, leases and delivers said devices to various persons, firms, copartnerships and corporations, in various states other than those in which the said devices are purchased by the respondent; and that in the course of commerce in buying and selling said devices, said devices are moved to, through and among the various states of the United States, and that there is a constant current of trade in the conduct of its said business in buying and selling said equipment among said various states of the United States.

PARAGRAPH THREE: That during all of said period, respondent, in the course of commerce among the several states and territories of the United States and in the conduct of its business as aforesaid, has been and now is leasing to retailers of its petroleum products, said devices for use by such retailers in storing and handling respondent's said petroleum products. That respondent, in leasing such devices as aforesaid during said period, has made and does now make, contracts or leases with the said retailers in and by the terms of which the said retailer agrees to use the said device for containing, storing and vending the products of the respondent, exclusively. That the rental or lease charge provided for in such contracts is a nominal sum and that no other consideration for the leasing of such equipments by

respondent, is provided for by said contracts, and that such devices are leased at nominal rentals as aforesaid to promote and advance respondent's petroleum and gasoline business. That such nominal sums or rentals do not afford a reasonable profit to respondent on the amount invested in such devices. That the respondent leases such equipments in competition in interstate commerce with manufacturers of similar equipments who are engaged in the sale of the same in such commerce.

PARAGRAPH FOUR: That the respondent sells its said products in various states and territories of the United States in competition with other refiners and wholesale dealers in petroleum products and gasoline, and respondent has practiced the leasing of said devices to retailers in the various states and territories as aforesaid, as a method of competing with other firms, persons, partnerships and corporations also engaged in refining and selling in wholesale quantities, gasoline, refined oil and petroleum products.

PARAGRAPH FIVE: That the contracts mentioned herein generally expressly provide that said devices shall be used by the lessee only for the purpose of holding and storing the respondent's said petroleum products, and all of said contracts or leases which the respondent has entered into as aforesaid, have been made on the condition, agreement or understanding, that the lessee or purchaser thereof should use the said device only for the purpose of holding and storing petroleum products purchased from the respondent. That a small number of retail dealers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, handle similar products of respondent's competitors, but a large majority of the retailers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, require and use in their business, only a single pump outfit.

PARAGRAPH SIX: That the respondent has practiced the leasing or selling of such devices upon the terms and conditions aforesaid, for the purpose of obtaining and holding customers, and of preventing its competitors from obtaining as customers, the retail dealers with whom it has entered into such contracts or leases as aforesaid.

PARAGRAPH SEVEN: That many competitors of the respondent do not sell or lease such devices to retail dealers upon the terms and conditions referred to herein, and such competitors have lost numerous customers to the respondent as a result of the respondent's practice of offering and leasing said devices to such retail dealers upon the terms and conditions aforesaid.

Conclusions:

That the practice of leasing such devices at a nominal rental and of selling such devices for a nominal consideration, is an unfair method of competition in interstate commerce as against the competitors of respondent engaged in the manufacture of such devices,

and in the sale of the same for profit, in the territory wherein the respondent leases such devices and also as against competitors of respondent engaged in the business of refining crude petroleum and selling at wholesale refined oils, gasoline and petroleum products, who do not invest in or make use of such devices for the purpose and on the terms and conditions aforesaid.

That the methods of competition and the business practices set forth in the foregoing Findings as to the Facts are under the circumstances, set forth herein, unfair methods of competition in interstate commerce within the meaning of Section 5 of an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes," and constitute a violation of Section 3 of an Act of Congress approved October 15, 1914, entitled, "An Act to supplement existing laws against unlawful restraint and monopolies, and for other purposes."

(Signed) VICTOR MURDOCK, *Chairman*,
HUSTON THOMPSON,
WILLIAM B. COLVER,
NELSON B. GASKILL,
Commissioners.

Dated this 27th day of April, 1920.

Commission's order to cease and desist—dated April 27, 1920.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss.:

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 27th day of April, A. D. 1920.

Present: Victor Murdock, chairman; Huston Thompson, William B. Colver, Nelson B. Gaskill, Jno. Garland Pollard, Commissioners.

FEDERAL TRADE COMMISSION
v.
GULF REFINING COMPANY. } Docket No. 320.

The Federal Trade Commission having issued and served its complaint herein wherein it is alleged that it had reason to believe that the above-named respondent, Gulf Refining Company, has been and now is using unfair methods of competition, in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and has been and now is violating the provisions of Section 3 of an Act of Congress approved October 15, 1914, entitled, "An Act to supplement existing laws against unlawful restraints

and monopolies, and for other purposes," and that a proceeding by it in respect of such alleged violation of Section 5 of the Act of September 26, 1914, would be to the interest of the public, and fully stating its charges in that respect, and the respondent having entered its appearance by W. J. Guthrie, its attorney, and having duly filed its answer, admitting certain of the allegations of said complaint and denying certain others thereof, and containing certain allegations as affirmative defense, and the Commission having offered testimony in support of the charges of said complaint, and the respondent having rested its case without introducing evidence, and the cause having been duly argued before the Commission, and the Commission having duly considered the record and being fully advised in the premises, and having made and filed its Report, Findings and Conclusions, which said Report, Findings and Conclusions are hereby referred to and made a part hereof.

Now, therefore, it is ordered, that the respondent, Gulf Refining Company, forever cease and desist from:

(1) Directly or indirectly leasing pumps or tanks or both and equipment for storing or handling petroleum products in furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effects as that resulting from the practice herein prohibited, and by reason of which this order is made.

(2) Entering into contracts or agreements with dealers in its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipment, the same shall be used only for storing or handling the products of respondent; and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited, and by reason of which this order is made.

Provided, however, that as to such pumps and tanks and equipments as are now leased by respondent, contrary to the provisions of this order, respondent shall be required, four months from the date of service hereof, to enter into new contracts or agreements with respect to same which shall not be incompatible with the purport and intent of this order.

It is also ordered under and by virtue of the authority conferred on the Commission by Paragraph B of Section 6 of an Act to create a Federal Trade Commission, to define its powers and duties and for other purposes, approved September 26, 1914, that the said Gulf Refining Company, respondent, shall within thirty days after the expiration of the time allowed for the respondent to comply with this order to cease and desist, report in writing to the Federal Trade Commission, fully stating and setting forth the nature of the changes

made in the conduct of its business with respect to such matter involved in the order to cease and desist, and shall set forth in such report in complete detail the plan or plans adopted for the lease, loan, gift or sale of any oil tanks and pumps for use in storing refined oil or gasoline. What plan or plans are in use or are proposed to be put in use, and also attached to such report, any contracts used by the respondent in the conduct of such business.

Dated at Washington, this 27th day of April, A. D. 1920.

By the Commission.

J. P. YODER,
Secretary.

[SEAL.]

Petition for review, etc.

FEDERAL TRADE COMMISSION
v.
GULF REFINING COMPANY.

To the Honorable the U. S. Circuit Court of Appeals for the Third Circuit:

I.

The petitioner is the Gulf Refining Company, a corporation under the laws of the State of Texas, with its principal office and place of business at Pittsburgh in the State of Pennsylvania. It makes this application under the terms of Section II of the Act of Congress of October 15, 1914, 38 Statutes 734, and Section 5 of the Act of September 26, 1914, 38 Statutes 719.

II.

Petitioner alleges:

(1) That on the eighteenth day of July, 1919, the Federal Trade Commission filed a complaint under the style hereinbefore given (Docket 320) against petitioner, charging that it had been using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of the Act of Congress of September 26, 1919, and that it had violated Section 3 of the Act of Congress approved October 15, 1914, known as the "Clayton Act."

(2) Due notice of said complaint was given to petitioner.

(3) On the fourth day of September, 1919, petitioner filed an answer thereto.

(4) A hearing upon said complaint was duly had and evidence introduced.

(5) On the 27th day of April, 1920, the Federal Trade Commission filed findings of fact and conclusions on said complaint and entered an order declaring the methods of competition and the business practices in said complaint set forth were unfair and in violation of law, and ordering that they cease.

(6) On the 29th day of May, 1920, notice of said order was given to petitioner.

A copy of the complaint, of the answer, of the findings of fact, and of the decree are filed herewith and made parts hereof.

Petitioner prays that the Commission be required to file herein a transcript of the evidence taken upon said hearing.

II-A.

Petitioner says that so much of the Act of Congress establishing the Federal Trade Commission as undertakes to authorize said Trade Commission and the courts to determine what is unfair competition and to prevent and punish same is unconstitutional and void for the following reasons:

(1) Said Act does not undertake to define unfair competition, but leaves the determination of what shall constitute this offense primarily to the Commission and ultimately to a court whereby

(a) A person engaged in business has no measure or standard by which his actions may be guided, but is subject to have his business disrupted and his property taken or destroyed for reasons or causes which he could not have foreseen or prevented;

(b) Instead of the law defining what may or may not be done, a person is subject to have his business destroyed and his property taken because he is unable to anticipate the views which the Federal Trade Commission and the courts might adopt with reference to the ethics or the effects of some course of business;

(c) A person in business has imposed upon him the burden of defending an action instituted by the Trade Commission, or of instituting one himself because the Trade Commission may have views different from his as to the ethics and advisability of a trade method.

(2) Said Act undertakes to delegate a legislative power, which rests (if anywhere) in Congress, to the Federal Trade Commission and the courts:

(a) The Act does not define unfair competition but leaves a legislative determination of what constitutes this offence to the Trade Commission and the courts;

(b) It leaves to the courts the method and character of punishment instead of defining the consequences of engaging in unfair competition.

(3) Said Act violates the Fourteenth Amendment to the Constitution of the United States, and the other provisions thereof, which undertake to prevent arbitrary governmental invasion of private rights:

(a) It undertakes to give general visitorial powers over the business of every individual engaged in interstate commerce (except transportation) to an extra-constitutional body invested with arbitrary and unrestricted powers;

(b) It requires of individuals engaged in business that they incur the expense of going into court to maintain the right to use their property as property has always been used, because this body conceives it should be otherwise used;

(c) It authorizes this body to interfere with the ordinary and natural right of contract, and requires that to protect this right the individual should defend, or institute, a procedure in court.

(d) It makes it necessary for the individual to incur the labor and expense of litigation when he has violated no criminal law, breached no contract, committed no tort, ignored no obligation but has merely failed to agree with the Commission as to some question of ethics, of business judgment, or of public interest.

(4) Said Act provides for judicial trial of issues (not involving any right or procedure in equity) whereby personal and valuable property rights may be determined, without providing for, or making possible, trial by jury.

III.

Petitioner says that the facts set forth in said complaint do not constitute unfair competition, are not contrary to the public interest, and do not monopolize or tend to restrain trade.

IV.

Petitioner says that it is not engaged in the business of buying and selling or leasing pumps and tanks in interstate business, and that the Federal Trade Commission is without jurisdiction over the subject-matter of the complaint.

V.

Petitioner says that it is not engaged in the business of buying and selling or leasing pumps and tanks, but that its only purchases of such equipment are for direct use by itself in the sale of products which it manufactures, or for the purpose of being furnished under lease or sale to persons with whom it makes an agreement for the sale of its products to be used in making such sales; that all of such sales of its products are in intra-state business and not in interstate business, and petitioner says that the Federal Trade Commission is without jurisdiction over the subject-matter of the complaint and that its order is void.

VI.

Petitioner says that it, together with its affiliated companies, is engaged:

(1) In the production of crude oil; this is not in any instance in interstate commerce;

(2) In the refining of crude oil; this is not in any case in interstate commerce;

(3) In the transportation of crude oil; this is in every case by common carrier when in interstate commerce;

(4) In the sale of petroleum products in interstate commerce; no part of the complaint is predicated upon such business;

(5) In the sale of petroleum products in intrastate commerce. The buying and leasing of pumps and tanks is solely in connection with the sale in intrastate commerce of its petroleum products, being incidental to the retailing—wholly within a state—of such products, either within the state of its manufacture, or within some other state after its interstate shipment by a common carrier and after the completion of the interstate transaction.

VII.

Petitioner complains of the findings and conclusions of fact and of the order, and assigns reasons as follows:

(1) The Federal Trade Commission is without jurisdiction because the methods and practices complained of were not used in interstate business.

(2) The practices complained of did not constitute unfair practices or methods in that they have never before been regarded as "opposed to good morals, as being characterized by deception, bad faith, fraud or oppression."

(3) They are not against the public policy as involving a "dangerous tendency to unduly hinder competition or create a monopoly."

(4) They are not in violation of any rule of law.

(5) The practices complained of did not create, or tend to create, a monopoly nor in any way restrain, or tend to restrain, trade.

VIII.

Paragraph I.

1. Specifically considering the report and findings and conclusions of fact by the Federal Trade Commission, petitioner complains of Paragraph 1 of the Findings of Facts, which is as follows:

"That the respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office located in the City of Pittsburgh, in the State of Pennsylvania, and is now and has been engaged in the business of purchasing and selling refined oil and gasoline, and is largely engaged in refining crude petroleum, and that it is now and has been during the four years last past, in connection with aforesaid business, engaged in the leasing and loaning, but not in the manufacture, of oil pumps, storage tanks and containers, and equipment hereinafter referred to as devices, in various states of the United States in competition with numerous other persons, firms, co-partnerships and corporations also engaged in the business of selling refined oil and gasoline, and refining crude petroleum."

And for cause of complaint avers:

(1) That it is not engaged in the leasing and loaning of oil pumps in various states of the United States in competition with numerous other persons, but is solely engaged in the business of refining petro-

leum and selling petroleum products; that its refining is entirely in the State of Texas; that it is in several states engaged in selling petroleum and its products; that any leasing and loaning of pumps is entirely and exclusively incidental to its business of selling gasoline, and no leasing or loaning is ever made to any person except for the purpose of effecting satisfactory arrangements, for the sale, within a state, of its products, and for providing safe and efficient appliances by which its products may be handled in the sale and delivery thereof to the public.

PARAGRAPH II.

2. Petitioner complains of the findings in Paragraph 2 to the following effect:

"In buying and selling said devices; that is to say, pumps, said devices are moved to and through and among the various states of the United States and that there is a constant current of trade in the conduct of its said business in buying and selling said equipment among the various states of the United States."

And petitioner avers that such of said pumps as are leased or loaned by petitioner are purchased for the specific purpose of installation within some particular state, to be used in the sale of its products to the public; that they are there used directly by petitioner or are leased to the individual who has been selected to make sale of petitioner's products at that place. These "devices" are installed for use at that place and are not thereafter moved or sold in interstate, or intrastate, commerce or otherwise, but are incidentally and continuously used thereafter in making delivery of petitioner's products to the public.

PARAGRAPH III.

3. Petitioner complains of the findings of fact in Paragraph 3, which are as follows:

"That during all of said period, respondent, in the course of commerce among the several States and territories of the United States and in the conduct of its business as aforesaid, has been and now is leasing to retailers of its petroleum products, said devices for use by such retailers in storing and handling respondent's said petroleum products. That respondent, in leasing such devices as aforesaid, during said period, has made and does now make, contracts or leases with the said retailers in and by the terms of which the said retailer agrees to use the said devices for containing, storing and vending the products of the respondent exclusively. That the rental or lease charge provided for in such contracts is a nominal sum and that no other consideration for the leasing of such equipments by respondent, is provided for by said contracts, and that such devices are leased at nominal rentals as aforesaid, to promote and advance respondent's petroleum and gasoline business. That such nominal sums or rentals do not afford a reasonable profit to

respondent on the amount invested in such devices. That the respondent leases such equipment in competition in interstate commerce with manufacturers of similar equipments who are engaged in the sale of the same in such commerce."

And for ground of complaint assigns:

(1) Petitioner in leasing said pumps stipulates that the retailer shall not use the said "devices" for containing, storing and vending the products of companies other than petitioner. Petitioner claims this is a proper provision because:

(a) There is no reason why the property and capital of petitioner should be used for the benefit of its competitors;

(b) By stipulating that no products other than the products of petitioner may be stored or used in such pumps and tanks, petitioner can have a reasonable assurance that inferior products will not be substituted for the product which it makes, and which is of high character and grade, and which meets the requirements of the laws of the state within which it is sold, and thereby its business name is protected, and its products properly and truthfully advertised.

(c) By making this stipulation, and doing what it can to make the stipulation effective, petitioner keeps the public informed as to the product which it buys and gives it assurance that it will not have imposed upon it gasoline and petroleum products which may be of an inferior character or which, for some other reason, may not be desired.

(d) Petitioner has the choice of directly using the pumps and tanks which it owns or may buy, or of making an arrangement by which its products are offered to and are sold and delivered to the public and its "devices" used therefor. If it should choose the former method no one would insist that there was anything wrong in refusing to handle the products of a competitor; if it should choose the latter it could, with just as much reason, refuse to permit its property to be used for the benefit of a competitor. The purpose of the law is to prevent unfair competition, not to prevent competition. When, by contract, by action of the Federal Trade Commission, or otherwise, all the capital in a field of business is combined, the necessary result is a total destruction of competition.

(2) Petitioner complains of the finding to the effect that the rental or lease charge provided for in the contract is a nominal sum, and that there is no other consideration for the leasing of such equipment, and says that the price or sum received is not the total consideration for the use of the equipment, but that that part of its capital which is invested in its equipment is used in the legitimate development of its business and in providing for the sale of its products, and in giving effective competition to other dealers in petroleum products within the territory in which the equipment is installed; that the equipment remains the property of petitioner to be used in providing some person other than the lessee with proper equipment in case lessee shows a lack of business capacity or of personal integrity, or a lack of ability to efficiently compete with

other sellers of petroleum products in the territory. Petitioner insists that it has the same right to use its capital in the development of its business in this way that it has to establish attractive and convenient delivery stations, or to advertise, or to employ efficient and accommodating men, or to use any other enterprising honest business device for the profitable sale of its products.

(3) Petitioner says that so much capital must be used in the production and sale to the public of gasoline; that in the conduct of this part of its business the best judgment of its officers is exercised in the proper handling of such capital as it has at its command to secure the best and most economical results; that whether its pumps and tanks are installed directly by it or by retailers to whom leases are made the installation is for the purpose of conserving the safety and convenience of the public; that if the retailer is compelled to install and maintain such equipment at great cost the expense will be reflected in the price to the public of the gasoline sold; that the equipment referred to as "devices" is essential to handling the product in the best and safest way; that the cost has to be considered in fixing the retail price of gasoline, and the result to the public is the same without reference to whether the plan criticised by the Commission be used or the charges to the retailer be increased.

(4) It complains of that part of the paragraph which states that such nominal sums of rentals do not afford a reasonable profit to its owner on the amount invested in such devices, and says:

(a) That it should be allowed to exercise its judgment as to whether the plan of business adopted furnishes a reasonable profit on the capital invested and (so long as its course is not dictated by improper or illegal motives) whether it should secure any return.

(d) That it should be permitted to determine the method of spending its money for the development of its business rather than to have the Federal Trade Commission, which lacks the experience of petitioner, to determine whether or not the policy is profitable.

(5) Petitioner excepts to that part of the finding to the effect that respondent leases such equipment in competition, in interstate commerce, with manufacturers of similar equipment who are engaged in the sale of the same in such commerce, and says:

(a) That it is not engaged in the manufacture or the sale or the leasing of such equipment, but that the incidental leases which it makes constitute not only a very small part of its own business but an inappreciable part of the business of manufacturing, buying and selling pumps and storage tanks.

(b) That no person connected with the conduct of its business and no stockholder (so far as is known) is directly or indirectly engaged in any branch of the pump or tank business, or has any interest in such business.

(c) That it is not in competition with manufacturers and sellers of pumps and storage tanks, but on the contrary is, to the exact extent to which it leases such equipment, plus the extent to which it buys and uses without leasing, a customer of the manufacturers and

sellers of such equipment. That while the gross amount of all of its purchases is an unimportant part of the business of manufacturing and selling such equipment, instead of stifling or destroying such business, it exactly, to that extent, encourages and helps said business, and instead of destroying or trying to destroy competition therein, it, as a customer, desires and secures the benefit of the competition which the law encourages and which the Commission is apparently trying to prevent.

(d) That many of the persons to whom leases of such equipment are made would be financially unable to purchase and install such equipment, and by providing the necessary funds for such purpose the petitioner, to that extent, adds to the number of pumps and tanks which can be manufactured and sold.

(e) That during the recent war it was compelled, by the action of the Shipping Board in taking several of its ships, to abandon the selling business in a part of its territory and has been compelled to make expenditures criticised by the Commission and other expenditures in order to re-establish its competition.

Paragraph IV.

4. Petitioner excepts to Paragraph 4 as follows:

"That the respondent sells its said products in various states and territories of the United States in competition with other refiners and wholesale dealers in petroleum products and gasoline, and respondent has practiced the leasing of said devices to retailers in the various states and territories as aforesaid, as a method of competing with other firms, persons, partnerships and corporations also engaged in refining and selling, in wholesale quantities, gasoline, refined oil and petroleum products."

And assigns reasons for exceptions:

(a) That in each of the states in which it does business it is in active competition with other producers in a business strictly intrastate; that its refining is also entirely intrastate and is confined to the refining of its own crude oil; that in the sale of its gasoline (the only product in which the "devices" are used) the course of business of petitioner is direct sale to the general public; this is usually by sales at its own stations by its own employes, but economical and profitable handling of such products sometimes require that arrangements therefor be made with local dealers; that such sales to the public are always in intrastate business; that in no one of said states does petitioner's sale of petroleum products, together with sale of its products by other retailers, exceed 20 per cent. of the total sales;

(b) That in order to make this competition in any sense effective it is compelled to sell to efficient retailers, to provide for the installment of efficient and safe equipment and to show the same degree and character of enterprise in the conduct and development of its business as is necessary to the success of any retail business;

(c) That it recognizes the impossibility of bringing about a monopoly even if it desired to do so;

(d) That in every state in which it is selling petroleum products it has been compelled to establish its business in competition with business already established, and has in every instance furnished the competition the law encourages, and its success is not possible if it is not permitted to use the ordinary methods by which competition is made possible;

(e) That it retains the business which it has, and secures business at places in which it has not theretofore made sales, by the character of its product and of its equipment.

Paragraph V.

5. Petitioner excepts to the findings in Paragraph 5 as follows:

"That the contracts mentioned herein generally expressly provide that said devices shall be used by the lessee only for the purpose of holding and storing the respondent's said petroleum products, and all of said contracts or leases which the respondent has entered into as aforesaid, have been made on the condition, agreement or understanding, that the lessee or purchaser thereof should use the said device for the purpose of holding and storing petroleum products purchased from the respondent. That a small number of retail dealers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, handle similar products of respondent's competitors, but a large majority of the retailers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, require and use in the business, only a single pump outfit."

And assigns as reasons:

(1) The terms of the contract, by which leases are made to retailers, stipulates that petitioner's equipment is not to be used in the handling of the products of its competitors, but petitioner insists that this is a proper provision because it is not called upon by any principle of business or law to furnish equipment for competitors, and because, by confining the use of its equipment to its own products, it is able to protect the public against inferior products and to furnish products desired by the public, and is enabled to effectively advertise and make its products known to the public.

(2) Petitioner should not be held for such consequences as may result from the fact that the number of retail dealers who handle similar products of its competitors is small, if it be a fact. If it be a fact, it is neither illegal or reprehensible. It is the purpose and desire of the petitioner when circumstances do not warrant a selling station of its own, to secure proper retailers for the handling of its products. If it can, by the quality of its products and the convenience and safety of its equipment, keep the retailer from installing the equipment of its competitors, a condition is brought about which petitioner should not be criticised for desiring and securing. The contract does not stipulate that the retailer shall not handle the

products of its competitors, nor is there any agreement or understanding to that effect. In a number of cases the retailer has installed equipment not only of petitioner, but of one or more of petitioner's competitors. In no case is the retailer prevented from making like installations by anything done by petitioner. Under the plan by which petitioner makes the lease of its equipment for a small or nominal sum, the retailer is enabled to make like arrangements with petitioner's competitors or, if he can not make such arrangements with its competitors, to employ capital saved by the arrangement with petitioner in the installation of other equipment. Under any arrangement other than that which has in the conduct of its business developed, it would rarely be the case that any retailer would incur the expense of installing more than one set of pumps and storage tanks. But under the plan in use, and in which petitioner participates, many dealers are able to offer the public the products of two or more refiners. Even where the retailer has installed only one set of pumps and tanks, petitioner has (if conditions justify) competition from other retailers who have installed the equipment of competitors; and communities, which would otherwise not have the benefit of competition, are able to secure it.

Paragraph VI.

6. Petitioner excepts to the findings of Paragraph 6 as follows:

"That the respondent has practiced the leasing or selling of such devices upon the terms and conditions aforesaid, for the purpose of obtaining and holding customers, and of preventing its competitors from obtaining as customers, the retail dealers with whom it has entered into such contracts or leases as aforesaid."

(1) Petitioner excepts to that part of the findings to the effect that it has practiced the leasing and selling of such equipment "for the purpose of preventing its competitors from obtaining, as representatives, the retail dealers with whom it has entered into such contracts" because there is nothing in the evidence which has been adduced, nor is there, in fact, such a purpose or anything to indicate such a purpose. The contract entered into does not prevent additional contracts with the retailer, nor does it have the effect to prevent him from making such further development of his business as the conditions warrant, and any development beyond this would be a waste for which either the retailer or the public would have to pay.

(2) In making a contract your petitioner exercises that degree of enterprise that secures and undertakes to hold a customer, and which is essential to its business, as it is essential to all other business. Whatever merit there may be in the non-competitive system is a merit petitioner cannot give or secure without violation of State and Federal statutes.

Paragraph VII.

7. Petitioner excepts to Paragraph 7 of the said findings as follows:

"That many competitors of the respondent do not sell or lease such devices to retail dealers upon the terms and conditions referred to herein, and such competitors have lost numerous customers to the respondent as a result of the respondent's practice of offering and leasing said devices to such retail dealers upon the terms and conditions aforesaid."

And petitioner says as to the findings to the effect that many of its competitors do not sell or lease such devices to retail dealers upon the terms and conditions referred to herein, and that they have thereby lost customers:

(a) That it is the purpose of the anti-trust laws to encourage competition and not to destroy it.

(b) That competition which does not affect the business of another is competition that cannot be to the benefit of the public.

(c) That no concern has a vested right in customers and that all development would cease if it should be established as a principle that when one customer has been secured by a concern no other business would have a right to offer any inducement to the customer to change.

(d) That no business should be penalized on account of lack of capital of its competitors, or the lack of enterprise of its competitors.

(e) That petitioner and others in the petroleum business should be permitted to exercise their respective judgments as to how the business should be conducted. It cannot be that the thoughtful consideration given by them (based upon experience and knowledge) could, with advantage to the public, be superseded by the immature judgment which the Federal Trade Commission (burdened with the conduct of the business of the country) would necessarily exercise.

And petitioner says that the method of business complained of:

(1) Provides a safe and efficient means of selling and delivering gasoline at many points where none but primitive and unsafe methods could otherwise be instituted.

(2) Provides competition where competition could not otherwise exist.

(3) Gives the newer oil companies an opportunity of developing competition with those formerly controlling the business of the country.

(4) Helps another important industry (the manufacturers of pumps and tanks).

(5) Violates no law, infringes no rule of good morals, is at discord with no business principle.

And petitioner says that the order to desist is unjustifiable and illegal governmental interference with a business rapidly and normally developing for the public convenience and good.

And it prays that said order be annulled.

GULF REFINING CO.,
By R. L. BOTTS,
General Counsel.
W. J. GUTHRIE,
Assoc. General Attorney.

In the United States Circuit Court of Appeals for the Third Circuit.

October Term, 1920.

GULF REFINING COMPANY, PETITIONER,
vs.
FEDERAL TRADE COMMISSION, RESPONDENT. } No. 2609.

And afterwards, to wit, on the 4th day of October, 1921, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Victor B. Woolley, and Hon. J. Warren Davis, Circuit Judges, and Hon. Hugh M. Morris, District Judge, and the court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 14th day of July, 1922, come the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises, renders the following decision.

In the United States Circuit Court of Appeals for the Third Circuit.

October Term, 1920.

STANDARD OIL COMPANY, PETITIONER,
vs.
FEDERAL TRADE COMMISSION, RESPONDENT. } No. 2599.

October Term, 1920.

GULF REFINING COMPANY, PETITIONER,
vs.
FEDERAL TRADE COMMISSION, RESPONDENT. } No. 2609.

March Term, 1921.

MALONEY OIL AND MANUFACTURING COMPANY, petitioner,
vs.
FEDERAL TRADE COMMISSION, RESPONDENT. } No. 2632.

Separate Petitions to Set Aside Several Orders of the Federal Trade Commission.

Before WOOLLEY and DAVIS, Circuit Judges, and MORRIS, District Judge.

WOOLLEY, Circuit Judge. In these proceedings we are asked to review and set aside three orders of the Federal Trade Commission commanding the petitioning corporations forever to cease and desist from a practice found by the Commission to violate Section 5 of the Act creating the Federal Trade Commission (38 Stat. 717) and Section 3 of the Clayton Act. (38 Stat. 730.) The applicable provisions of these statues are, in the first, "That unfair methods of competition in commerce are * * * unlawful," and, in the second, "That it shall be unlawful for any person engaged in commerce to lease * * * or make a sale * * * of goods, * * * machinery, * * * or other commodities * * * on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, * * * machinery, * * * or other commodities of * * * competitors of the lessor or seller, where the effect of such lease or sale, * * * or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

These are three of a large number of cases involving the same practice. They were tried in three groups. The testimony in one group bore most directly on gasoline marketing in states along the Atlantic seaboard. In another it related particularly to business done by companies within the State of Ohio. In the third it concerned business farther west. As the testimony in all cases was in the main identical, the twelve comprising the eastern group (which includes the cases at bar) were combined and heard together.

The testimony discloses a practice which has been widely pursued in the eastern part of the United States by corporations refining and marketing gasoline. It consists of what is practically a loan, or technically a lease without rental, by a wholesaler to a retailer, of equipment for the temporary storage, measurement and delivery of gasoline to the consuming public. The practice extends mainly to the retailer whose place of business is referred to as a "curb filling station." The leased equipment is known as a "Curb pump outfit" and comprises a sunken tank for the storage of gasoline and a pump of familiar design by which gasoline is drawn from the tank and delivered to motor vehicles. The retailer is the proprietor of the station and is generally engaged in some other business. Typical of

his class are keepers of country stores, residents in hamlets and at cross-roads, and farmers. The practice does not relate to retail stations owned and managed by the refining and marketing companies themselves. These are the more elaborate affairs also familiar to the public and generally known as "service stations." Proprietors of garages comprise an intermediate class of retailers to whom the practice in some measure extends.

The practice held by the Commission to offend against the statutes is found wholly within the terms of the leasing contracts. The form of the contract is important in two respects: First, in what the wholesaler requires the retailer to do; and second, in what it does not require him to do. The form of contract used by the Standard Oil Company is identical in substance with contracts used by the other petitioners. Paraphrased, it is as follows:

Reciting by preamble that the retailer is now purchasing gasoline from the wholesaler for sale to its customers and has requested it to install on his premises equipment for the better storage and handling of the gasoline so purchased, and that in compliance with his request the wholesaler is about to make the installation, it is agreed between them that the "equipment shall be used solely for the storage and handling of motor gasoline purchased by the" retailer from the wholesaler. Then follow undertakings by the retailer that he will maintain the equipment in good condition at his own cost; that he will not encumber or remove it or permit it to be seized or taken in execution; and that he will indemnify the wholesaler from liability for injuries occasioned by leakage, fire, or explosion of gasoline. The contract concludes with four provisions for its termination: First, upon the use of the equipment by the retailer for any other purpose than the storage and handling of gasoline purchased from the wholesaler; second, upon the retailer's failure for thirty days to purchase gasoline from the wholesaler; third, upon the sale of the premises by the retailer; and fourth, by either party upon five days' notice in writing to the other party; with the right of the wholesaler in any event to enter upon the premises and remove the equipment.

Having stated what the contract requires the retailer to do, the things which it does not require of him are equally important. The first is he is not required to pay any license fee, rental or other thing for the use of the equipment; nor is he restricted in his business to the equipment covered by the contract. On the contrary, he may use other equipment leased by competing wholesalers, or purchased by himself. Nor does the contract expressly tie him to the wholesaler's products. He may freely deal in gasoline or other petroleum products purchased from competing wholesalers. He may not, however, use the equipment of the contract for storing and handling a competitor's gasoline.

In justification of their practice the petitioners maintain that the curb pump outfit is a natural development of the oil industry. In this industry the distribution and marketing of petroleum products more or less volatile and therefore more or less dangerous has

always been a serious problem. The petitioners point out that for many years kerosene and other less volatile oils have been sold to retailers in barrels or direct to householders in cans. The barrels and cans being the property of the wholesaler are returned when the contents are removed. When the market for gasoline and more volatile oils developed, the wholesaler for safety shipped them to the retailer in steel barrels or drums. These also remained the property of the wholesaler and were returned when empty. With the marvelous increase of motor vehicles in all sections, urban and rural, there came a corresponding necessity for wider distribution of gasoline. Distribution from large central reservoirs to distant places by barrels and drums was no longer practicable. Then curb filling stations were established and curb pump outfits were installed whereby gasoline is delivered by tank trucks to many smaller centers and there stored and sold. These centers grew in number as the demand spread. At first this demand was met by one station and one outfit. As the demand increased stations and outfits were multiplied, the purpose of the practice, the petitioners claim, being to increase business by making easy and convenient the sale of gasoline to the public everywhere. But outfits cost money and the little storekeeper and the farmer by the roadside could not be induced, and frequently were not able, to invest capital in the purchase of an outfit. The result was that outfits were purchased by the wholesaler and loaned or leased to the retailer at practically no cost to him, yet upon the terms with respect to their use which we have detailed.

The view which the Federal Trade Commission takes of this practice is quite different. Its conclusions based on its findings of fact are that the installation of one outfit either supplies the needs of the retailer or meets the demand of his locality, and that, in consequence, the retailer has neither economic means nor personal desire to permit the installation of more than one outfit on his premises; that the contract for an outfit has the effect of tying the retailer to the products of the one wholesaler so long as one outfit meets the local demand and of substantially lessening competition by enabling the wholesaler to monopolize first one retailer and then, as the contracts are multiplied, to monopolize many thousand retailers, and eventually the whole territory in which they reside. Finding this practice of the petitioners violative of the laws referred to, the Commission entered the orders to cease and desist here under review.

On this statement of facts we shall discuss the practice as it bears on four classes of interested parties. The first of these is the public. The Federal Trade Commission Act, in so far as proceedings thereunder are founded on a public interest, provides,

"* * * if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a com-

plaint stating its charges and in that respect, * * *." (38 Stat. 719, Sec. 5. F. T. C. *vs.* Gratz, 253 U. S. 421).

The petitioners challenge the authority of the Federal Trade Commission to institute and prosecute these proceedings on two grounds as affecting the public interest. The first is, that the complaints do not allege facts necessary to show that public interest is involved. Upon taking this position there arose an issue whether public interest is a matter to be found by the Federal Trade Commission preliminary to the issuance of its complaints, or is a fact to be alleged in the complaints and proved like any other fact. This question, in view of the record, is purely academic, because whether public interest is to be regarded as a consideration moving the Commission to action or a jurisdictional fact to be pleaded and proved in support of its action, the fact of public interest in these cases is abundantly established.

The law of unfair competition in its modern conception regards as its chief concern the effect of forbidden acts upon consumers. The Congress in passing the Clayton Act and denouncing tying contracts and leases obviously had in mind the public as the principal sufferer therefrom. It is true, as said by Judge Denison in Steers *vs.* United States, 192 Fed. 1, in speaking of the Sherman Anti-Trust Act, 26 Stat. 209, that the theory of injury to the public lies at the bottom of the statutes and is directed against things which tend to deprive the public of the advantages which flow from free competition. Having denounced methods of business which are unfair and which substantially lessen competition and tend to create a monopoly, it is clear that in a case of this kind the public is within the protection of these statutes. If under these statutes the practice is illegal, then in truth the public which pays the bill is the main sufferer. As the practice extends to many thousand retailers and comprehends many million transactions through territory comprising more than half of the population of the United States, it is idle to say that the public has not an interest. Therefore, on this contention we think the petitioners have wholly failed to grasp the principle and purpose of the statutes and are entirely wrong in their contention.

The next contention of the petitioners, however, is very different. It squarely meets the issue of public interest and is to the effect that the evidence fails to show that the public has been injured. With this we agree. Postponing discussion of the effect of the practice upon competition and monopoly, we do not find that the practice has increased the cost of distribution or has enhanced the price of gasoline to the public. On the contrary it has decreased the cost of distribution. Whether the price to the public has been reduced, we cannot say. Clearly the public has found an advantage in the practice both in the matter of convenience and in the certainty of getting the precise make of gasoline advertised on the globe of the pump. On the other hand, if the orders of the Commission commanding the petitioners to cease and desist from the practice and thereafter to lease outfits to retailers only on remunerative rentals stand, the in-

evitable result will be that the number of curb filling stations will be reduced, thereby lessening the convenience to the public; or the rental charged the retailer for the outfit will be covered by fixing wholesale prices so as to allow him a larger profit. In the readjustment, the public doubtless will undergo its usual experience of paying higher prices.

The second class of parties interested in or affected by the practice is that of oil refiners or wholesalers, including both the petitioning wholesalers—the leading actors in the practice—and their wholesale competitors. The parts played by the members of this class depend for their legality upon the scope and purpose of the two statutes involved.

The first paragraph of each of the orders of the Commission does not deal with the restrictive clause of the contract; it deals solely with the leasing of outfits for a nominal rental or for no rental at all. One question decided by the Commission and here under review is whether this feature of the contract is an unfair method of competition within Section 5 of the Federal Trade Commission act. Interpreting this section, the Supreme Court, in Federal Trade Commission vs. Gratz, 253 U. S. 421, 427, said:

"The words "Unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The Act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

Therefore in determining, as matter of law, whether leasing of gasoline outfits without rentals is an unfair method of competition, we shall inquire whether the method is characterized by oppression of competitors or is against public policy because of its dangerous tendency unduly to hinder competition or create monopoly. So also under the Clayton Act, by force of which the Commission framed the second paragraph of each of its orders denouncing the restrictive clause of the contract, we shall, upon the authorities given below, make a similar inquiry with reference to the effect of the practice in lessening competition and creating a monopoly. To make clear the principle upon which we shall examine the testimony and decide these cases, it may be well to observe that the Clayton Act, which is a part of the scheme of laws against unlawful restraints and monopolies, does not wait for its operation until monopolies have been created and restraints of trade established, but seeks to reach them in their incipiency and stop their growth. Yet, in this avoiding an objectionable effect by removing the cause, the Congress did not intend the statute to reach every remote lessening of competition or every dim and uncertain tendency to monopoly. It intended

rather that the Commission, and ultimately the courts, should inquire not whether a given practice may possibly lessen competition or possibly create a monopoly, but whether it probably lessens competition—and lessens it substantially—and whether it actually tends to create a monopoly. The Standard Fashion Company vs. Magrane-Houston Company, — U. S. — Though differing somewhat from other laws, as we have indicated, the Clayton Act, nevertheless, deals with matters within the realm of monopoly. Therefore in determining whether given acts amount to unfair methods of competition within the meaning of the Federal Trade Commission Act, or substantially lessen competition and tend to create a monopoly within the meaning of the Clayton Act, the only standard of legality with which we are acquainted is the standard established by the Sherman Act in the words "restraint of trade or commerce" and "monopolize, or attempt to monopolize," and by the courts in construing the Sherman Act with reference to acts "which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade," and "restrict the common liberty to engage therein." Great Atlantic & Pacific Tea Co. vs. Cream of Wheat Co., 224 Fed. 566, 573; affirmed 227 Fed. 46; United States vs. American Tobacco Co., 221 U. S. 106, 179; United States vs. Patten, 226 U. S. 525, 541; Eastern States Lumber Asso. vs. United States, 234 U. S. 600, 613, 614; Standard Oil Case, 221 U. S. 1; Standard Fashion Company vs. Magrane-Houston Company, — U. S. —

Applying this standard to the trade practice here involved, the first question, that of unfair method of competition, relates to the leasing of outfits without rentals.

Is this phase of the practice oppressive upon competitors and does it tend to create a monopoly? Concededly, a lease of a curb pump outfit without rental gives a wholesaler a trade advantage over its competitors. This alone is not unlawful, for such advantage is the object of all competition and is attained whenever one sells another goods of greater excellence or at lower prices than goods offered by others. Does this trade advantage contain the seeds of monopoly? It admittedly leaves competitors free to install competing outfits in the same locality and in all other localities. It also leaves every competitor free to place its outfit with the same retailer if it can prevail upon him by the ordinary competitive inducements of better goods, lower prices, and easier terms of credit. That the practice imposes upon a competitor the investment of more capital is an argument which would apply with equal force—and with equal infirmity—to competition based on superiority of goods and liberality of credit.

Under the Federal Trade Commission Act declaring unfair methods of competition unlawful—as the Act stood before the passage of the Clayton Act—a loan of a curb pump outfit without return or a lease without rental did not, we think, tend to create a monopoly, and, accordingly, was not, in our opinion, an unfair method of competition.

But the Clayton Act, when it came along, bore upon another phase of the contract, namely: upon the clause which restricts the use of the leased outfit to the product of the wholesaler, thereby, the Commission found, lessening competition and tending to create a monopoly. Such a clause of a contract, commonly known as a tying contract, is to be construed not by its terms alone but by its effect as well. The Act looks particularly to the consequences. In the United Shoe Machinery Corporation case, —— U. S. ——, the Supreme Court said:

"While the clauses enjoined do not contain specific agreements not to use the machinery of the competitor of the lessor, the practical effect of these drastic provisions is to prevent such use. We can entertain no doubt that such provisions as were enjoined are embraced in the broad terms of the Clayton Act which cover all conditions, agreements or understandings of this nature. That such restrictive and tying agreements must necessarily lessen competition and tend to monopoly, is, we believe, equally apparent * * *. This system of tying restrictions is quite as effective as express covenants could be and practically compels the use of the machine of the lessor except upon risks which the manufacturers will not willingly incur."

The point of similarity between the United Shoe Machinery Corporation case and the cases at bar is that, in both, the offending clauses did not expressly provide against the use of machinery or equipment of competitors. The difference between the contract clauses in the two cases is that as certain machinery of the United Shoe Machinery Corporation was essential to the lessee in his business, the practical effect of the clauses in that contract, although not specifically prohibiting the use of the machinery of a competitor, was absolutely to prevent its use; while the clause of the contract in the cases under consideration related to but one kind of machine or equipment, and extended to a situation which did not impose upon the lessee the necessity of obtaining something from the lessor which was indispensable in his business, the clause, in consequence, did not have the practical effect of preventing the use of equipment of a competitor.

Also, the cases at bar are distinguished from the Standard Fashion Company vs. Magrane-Houston Company, —— U. S. ——, by the fact that the contract in that case contained an express agreement that the retailer should not sell or permit to be sold on his premises any other make of patterns. Here was a restrictive covenant which by its terms came within the third section of the Clayton Act. In discussing this clause the Supreme Court approved an observation in the opinion of the Circuit Court of Appeals, as follows:

"The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single pattermaker the pattern business of dealers most resorted

to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combination: so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business."

It has been suggested that this expression is apposite to the leasing contract here under discussion. But we think the cases are distinguished by the important fact that there the dealer was restricted by the contract to the sale of patterns of one manufacturer. This eliminated from his business all other patterns and tied him to the patterns of the contract. Here he is restricted in the use of the leased outfit to the storage and delivery of gasoline purchased from the lessor, but he is not limited to the use of one outfit, nor is he hampered in the sale of gasoline and other products of other manufacturers. The contract leaves every competitor free to persuade the retailer to install an additional outfit or to replace the outfit already installed by one of its own; and permits the retailer to yield if he chooses. While the effect of the restrictive clause of the contract in these cases may make competition somewhat more difficult because of the inclination of a satisfied retailer to stand by his wholesaler until another comes along and offers him something better, we are of opinion that the clause does not thereby lessen competition between wholesalers to the extent contemplated by the statute and that a tendency to monopolize the wholesale trade has not been disclosed. "That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial." Standard Fashion Company vs. Magrane-Houston Company, —— U. S. ——; Standard Oil Co. vs. F. T. C., 273 Fed. 48; Canfield Oil Co. vs. F. T. C., 274 Fed. 571; Sinclair Refining Co. vs. F. T. C., 276 Fed. 636.

The third class of parties interested in the practice is that of retailers.

Many retailers buy and own curb pump outfits. With these we have nothing to do except to note that by the practice of leasing outfits competition with them is greatly increased. We are concerned only with the retailer who has not money enough to purchase an outfit, or, having money, does not care to risk it. What happens? If his locality promises trade, one of the many wholesalers will supply him with an outfit without cost and without risk to him. The only condition imposed is that he shall not store and deliver through the outfit gasoline of any other wholesaler. The tying element in the transaction, if any there be, is the one arising from human nature and business sense, namely, that the retailer will install no other outfit so long as he is satisfied with the quality and price of the wholesaler's gasoline and so long as one outfit serves his trade. The contract leaves him perfectly free to deal in all petroleum products made by competing wholesalers. He is at liberty to install, by lease or purchase, as many other outfits as he may choose and to sell through them as many brands of gasoline as he may desire. The leasing contract, being terminable by him at will on brief notice, permits him to

change outfits at will, replacing one by another as often in the course of wholesaler's competition as he is induced to do so. The retailer, regarded in the aggregate, is an actor in the practice, who by reason of his number, place and interest causes competition between wholesalers to be increased rather than lessened. If the practice is abridged or abolished the retailer's risk is increased and his number diminished, and, correspondingly, competition is lessened. Certainly the retailer's part in the practice violates neither of the statutes. Nor, for the reasons given, can we think he is monopolized by the wholesaler, or the territory in which many retailers do business under the practice is monopolized.

The fourth class of parties claiming an interest in the practice is that of manufacturers of curb pump outfits. Of those there are a half dozen or more in the country, in none of which the petitioning corporations have an interest. The petitioning corporations do not manufacture pump outfits themselves but purchase them from manufacturers like anyone else. The Commission found as a fact that having purchased outfits, the petitioning corporations then leased them in competition with manufacturers engaged in the sale of like equipment in commerce, and upon this finding drew the conclusion, "That the practice of leasing such devises at a nominal rental * * * is an unfair method of competition in interstate commerce as against the competitors of respondents engaged in the manufacture of such devices, and in the sale of the same for profit, in the territory wherein the respondent leases such devices * * *."

After the manufacturer has sold equipments to the respondents without condition or limitation, and has turned them loose in commerce, we are at a loss to see just how he can be heard to complain that the equipment so sold and paid for is being leased by the owners on terms which make it difficult for him to sell like equipments to others. As there is involved here no question of fraud, deception, good conscience, or even business ethics, we should hesitate to follow business transactions to this length and determine whether conduct so remotely related to the original transaction of purchase is an unfair method of competition.

Having given these cases full and deliberate consideration, we are of opinion that, while the evidence supports some of the Commission's findings of fact as distinguished from the conclusions drawn from them, it does not establish the offences laid in the complaints and founded on the statutes, and, accordingly, does not sustain the orders based thereon. Therefore, we are constrained to set aside the orders and direct that the complaints be dismissed.

MORRIS, District Judge, concurring in part and dissenting in part.

The operative parts of the order of the Commission here attacked are that the respondent forever cease and desist from:

"1. * * * leasing pumps or tanks or both and equipment for storing or handling petroleum products in furtherance of its petroleum business, at a rental which will not yield to it a reasonable

profit on the cost of same after making due allowance f depreciation * * *.

"2. Entering into contracts or agreements with dealers in p petroleum products or from continuing to operate under any co tract or agreement already entered into whereby such dealers agr or have an understanding that as a consideration for the leasing t them of such pumps and tanks and their equipment, the same sha be used only for storing or handling the products of responden * * *."

The first paragraph of the order is directed only to the metho of competition whereby the petitioners lease pumps and tanks t retailers at a nominal rental and is concerned not at all with th restrictive or tying clause of the lease. Divorced from the tyin clause, leasing the pumps at a nominal rental is, in my opinion, practice "never heretofore regarded as opposed to good morals be cause characterized by deception, bad faith, fraud or oppression, nor is that practice against public policy as declared by the She man and Clayton Acts and, consequently, is not an unfair metho of competition within Sec. 5 of the Trade Commission Act as inter preted by the Supreme Court in Federal Trade Commission v Gratz, 253 U. S. 421, 427, even though the leasing of the pumps a a nominal rental may, perhaps, have a tendency to lessen com petition either in the sale of pumps or in the sale of gasoline a wholesale. I am, therefore, in full accord with the views expresse by the majority of the court with respect to the first paragraph o the Commission's order.

The second paragraph of the order rests upon Sec. 3 of the Clayto Act. While Sec. 5, of the Trade Commission Act provides "if i shall appear to the Commission that a proceeding by it * * would be to the interest of the public, it shall issue," &c., no simila provision is found in the Clayton Act. In proceedings under that ac public interest is as conclusively presumed as in a criminal proceed ing and needs to be neither alleged nor proved. Consequently, a I see it, the petition for review presents with respect to the secon paragraph of the order two questions only. First, whether the lease here involved are "on the condition, agreement or understanding that the lessee * * * shall not use or deal in the goods, * * merchandise * * * or other commodities of a competitor of th lessor" and, if so, then, second, whether "the effect of such lease, * * * condition, agreement or understanding may be to substantially lessen competition or tend to create monopoly in any line of commerce," both within the meaning of Sec. 3 of the Clayton Act. The leases contain the following provision:

"That the said equipment shall be used solely for the storage and handling of motor gasoline purchased by the party of the second part from the party of the first part for the purpose aforesaid."

While the foregoing clause does not contain a specific agreement not to use or deal in the gasoline of a competitor of the lessor, yet

the clause falls within the terms of the Clayton Act if its practical effect is to prevent such use. United Shoe Machinery Corp'n, et al. v. The United States (Decided April 17, 1922). Whether the practical effect of the restrictive agreement is to prevent the lessee from using or dealing in the gasoline of a competitor must be determined from the findings of the Commission and the evidence adduced before it, for under section 11 of the Clayton Act its findings of the fact are conclusive, if supported by the testimony. One of the findings of the Commission, supported by the testimony, is "that a small number of retail dealers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, handle similar products of respondent's competitors, but a large majority of the retailers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, require and use in their business only a single pump outfit."

With respect to the one pump retailer the restrictive clause in the leases in question is as effective in preventing the lessee from using or dealing in the gasoline of a competitor of the lessor as if the lease expressly so provided. True, the lessee may terminate the lease at the time and under the conditions mentioned therein but that fact does not enable the tying clause to elude the prohibition of section 3 of the Clayton Act for that section operates with respect to short term leases and leases at will in like manner and with like force as it does with respect to long term leases or, for that matter, leases in perpetuity. The legality or illegality of the tying clause is dependent not at all upon the duration of the lease or the manner in which it may be terminated. It is likewise true that the lessee has the right to install another pump of his own or a pump of a competitor, but as his business does not warrant or require more than one pump he has not installed more than one and, consequently, his right is not a practical one but a mere abstract right. The result in my opinion is that in practice the restrictive clause of the leases in question has prevented and prevents a "single pump" lessee from using or dealing in gasoline of a competitor of the lessor just as effectively as if the lease had expressly so provided. Consequently, the lease falls within the prohibition of Sec. 3 of the Clayton Act if the effect of such lease "may be to substantially lessen competition or tend to create a monopoly" in selling gasoline at wholesale. Whether its effect may be to substantially lessen competition or tend to create a monopoly is our second question for consideration. The leases are now in force. The fact that they may be terminated at some future time is not relevant to the issue now under consideration. What has already been said shows that "a large majority of the retailers" require for use in their business only a single pump outfit and the practical effect of the restrictive covenant of the lease under which they operate is to prevent such large majority from using or dealing in the gasoline of competitors of their respective lessors. Thereby free competition among the wholesalers of gasoline has been

and now is restricted not with respect to an insignificant number o retailers but with respect to a large majority thereof and as effe tually as if the leases were in perpetuity and as if they expressl prohibited the lessee from using or dealing in the gasoline of th competitors of the respective lessors.

The petitioners have set us as a reason for the reversal of th Commission's order the excellence of the pump as a means for sto ing and delivering gasoline. But the Commission has not attacke the pump. On the contrary it admits the pump's many advantag and great utility. It denies, however, the right of the petitione to make unlawful contracts with respect thereto or otherwise to us it as a means of stifling competition. The petitioners further urg that the restrictive clause is the only method by which they are en abled to use and adequately protect their trademark. Even if thi contention were supported by the evidence it would be ineffectiv for the petitioners are not at liberty to violate the law of the lan whatever proper result may be the consequence of their so doing The evidence, however, discloses that many pumps are owned b retailers, yet there is no evidence that the name of the gasoline be ing sold through such pumps is not exhibited in the same manne as it is on the leased pumps. Nor is there any evidence that in suc cases the gasoline of one wholesaler has been sold as the gasoline o another. These last contentions of the petitioners are, in my judg ment, wholly irrelevent to either of the two issues presented wit respects to Sec. 3 of the Clayton Act. Again, the petitioners con tend that by means of the leases in question the number of retailer has been substantially enlarged and competition thereby increase rather than lessened. If it be a fact that by means of the leases th number of retailers has been increased such increase was beyon question due to the nominal rental and not to the tying clause an the tying clause is none the less invalid even though accompanie by other clauses that are valid. Furthermore, each increase ob tained by the nominal rental was simultaneously monopolized b the tying clause and competition thereby lessened and not increased

Although not differing from the majority of the court as to th legal principles by which the correctness of the second paragraph of the Commission's order should be tested, yet I find myself not in full accord with their ultimate decision for the only conclusion tha I am able to reach by applying those principles of law to the fact of these cases is that the effect of the restrictive covenant has been now is and so "may be" to substantially lessen competition: that its practical effect of the covenant is to prevent the "one pump" re tailer from using or dealing in the gasoline of a competitor of hi lessor and that, consequently, all "one pump" leases are in viola tion of Sec. 3 of the Clayton Act and invalid.

Endorsements: 2599. Opinion of the Court by Woolley, J., and Dissenting Opinion by Morris, J. Received and Filed July 14, 192 Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit.

October Term, 1920.

GULF REFINING COMPANY, PETITIONER,
vs.
FEDERAL TRADE COMMISSION, RESPONDENT. } No. 2609.

Appeal from the Federal Trade Commission of the United States.

This cause came on to be heard on the transcript of record from the Federal Trade Commission of the United States and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the order of the said Federal Trade Commission in this cause be, and the same is hereby set aside, with direction, that the complaint be dismissed.

VICTOR B. WOOLLEY, *Circuit Judge.*

PHILADELPHIA, *July 14th, 1922.*

Endorsed: No. 2609. Order Setting Aside Order of Federal Trade Commission, etc. Received & Filed, July 14th, 1922. Saunders Lewis, jr., clerk.

UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the Federal Trade Commission of the United States, greeting:

Whereas, lately before the Federal Trade Commission of the United States, before you or some of you, in a cause between the Gulf Refining Company, (defendant below) Petitioner, and the Federal Trade Commission, (plaintiff below) Respondent, and order was entered by the said Federal Trade Commission against the Gulf Refining Company, on the twenty-seventh day of April, 1920, which is of record in the office of the said Federal Trade Commission to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the transcript of the record of the said Federal Trade Commission which was brought into the United States Circuit of Appeals for the Third Circuit by virtue of ——— ——— agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And whereas, in the term of October, in the year of our Lord one thousand nine hundred and twenty-one, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the order of the said Federal Trade Commission in this cause be, and the same is hereby set aside, with direction, that the complaint be dismissed.

PHILADELPHIA, *July 14th, 1922.*

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said petition notwithstanding.

Witness, the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, at Philadelphia, the seventeenth day of August, in the year of our Lord one thousand nine hundred and twenty-two (1922).

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

(Endorsement:) Original File No. 2609. U. S. Circuit Court of Appeals, Third Circuit. No. 4, October Term, 1921. Gulf Refining Company, petitioner, vs. Federal Trade Commission, respondent. Copy of mandate.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original of Vol. I of record and proceedings in this court in the case of Gulf Refining Company, petitioner, vs. Federal Trade Commission, respondent, on file, and now remaining among the records of the said court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 11th day of September in the year of our Lord one thousand nine hundred and twenty-two and of the independence of the United States the one hundred and forty-seventh.

[SEAL.] SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

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